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No. 08-849

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IN THE

Supreme Court of the United States

RAYMOND A. KIGHT, ET AL.,

Petitioners,

v.

SHERRI A. TURNER,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of Maryland

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent sued petitioners on state and federal claims in federal court. The district court denied respondent's federal claims on the merits and then declined to exercise supplemental jurisdiction over the state claims. The Fourth Circuit affirmed the dismissal of the federal claims. Three days after the conclusion of the federal appellate proceedings, respondent refiled her state claims in state court.

The Questions Presented are:

1. Whether the Maryland Court of Appeals erred in adopting the consensus view that state law claims dismissed by a federal district court under 28 U.S.C. § 1367(c) remain "pending" for purposes of 28 U.S.C. § 1367(d) throughout a timely appeal from the court's dismissal of the related federal claims.

2. Whether this Court should grant review to decide whether 28 U.S.C. § 1367(d) grants a plaintiff a maximum of thirty days to refile her claims in state court when that question makes no difference to the outcome of this case because respondent refiled her claims within three days.

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STATEMENT OF THE CASE

The resolution of this case hinges on a single question: when does a state law claim cease to be "pending" for purposes of 28 U.S.C. § 1367(d) (2000)? There is no disagreement among the lower courts on this issue. Every court that has squarely addressed the issue – other than the intermediate state appellate court whose decision was reversed by the Court of Appeals of Maryland in this case – has reached the same conclusion: when a plaintiff appeals a federal district court's dismissal of her federal and pendent state claims, her state claims remain "pending" under Section 1367(d) until the conclusion of federal appellate proceedings.

1. While the decisive legal issue in this case is straightforward, the factual allegations and procedural history are more complicated.[1] In February 2000, respondent, Dr. Sherri A. Turner, missed a scheduled appearance in state court on a landlord-tenant matter because she was at the hospital attending to her fifteen-year-old daughter, who two days earlier had been struck by an automobile and severely injured. Appellant's Br. and

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[1] For purposes of reviewing a decision granting summary judgment or a motion to dismiss, this Court "take[s] the facts alleged by [the nonmoving party] to be true." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 724, 747 (1998) (using this standard in cases where summary judgment has been granted); *see Berkovitz v. United States*, 486 U.S. 531, 540 (1988) (using this standard in cases seeking review from a motion to dismiss).

Record Extract at 4, *Turner v. Kight*, 957 A.2d 984 (Md. 2008) (No. 00736).

In April 2000, petitioners Robin Lewis and William Pechnick, deputies with the Montgomery County Sheriff's Office, came to respondent's home to execute a warrant that had been issued for respondent's arrest on a charge of contempt of court relating to her failure to appear. Respondent explained to the officers that she had suffered a spinal cord injury in a 1997 automobile accident and was awaiting surgery, and that her daughter had recently been struck by a car. Rather than arrest her, the officers then gave respondent another opportunity to turn herself in; she did so two days later. *Turner v. Kight*, No. 04-1125, 2005 WL 32826, at *1 (4th Cir. Jan. 7, 2005).

Respondent arrived at the Montgomery County Sheriff's Office in the morning of April 21, 2000, with her fourteen-year-old daughter. After being instructed to leave her pocketbook with her daughter in the waiting room, respondent was taken to another room, where she was handcuffed to a table and arrested. She was searched and ordered to surrender all her belongings, including medicine and a neck brace which she had brought to alleviate pain and muscle spasms related to her spinal cord injury. Respondent was then driven to a holding cell at the District Court of Maryland of Montgomery County (MCDC) to await appearance before a judge. The judge set bail at $100, which respondent was unable to pay, and so she was again placed in detention at the MCDC. *Id.* at *1-*2.

During the period of respondent's detention, officers refused to answer her inquiries regarding the

welfare of her child, her right to a telephone call, the whereabouts of her neck brace, her ability to see a doctor, and her right to arrange bail. She was strip-searched and repeatedly taunted, all the while suffering excruciating pain from her spinal condition and denial of access to her medication and neckbrace. Respondent was finally released when her daughter posted the $100 bail, approximately twelve and one-half hours after respondent first arrived at the police station. *Id.* at *2.

2. On May 15, 2001, respondent brought suit in federal district court against Montgomery County and various individual officials under 42 U.S.C. § 1983, alleging multiple violations of her federal constitutional rights in the course of her arrest and detention. She then amended her complaint, adding state constitutional and common law tort claims. Respondent's state law claims had a statute of limitations period of three years under Maryland law. Pet. App. 4.

On March 26, 2002, the federal district court granted summary judgment in favor of the defendants on some of respondent's federal claims, dismissed others, and declined to exercise jurisdiction over the state claims.

Respondent timely moved for reconsideration of the district court's dismissal of her federal claims. On August 7, 2002, the federal district court agreed to reconsider one of the federal claims, but on August 20, 2003, it granted summary judgment in favor of the defendant on that claim as well. Respondent timely filed a motion for reconsideration of that judgment, which was denied on December 22, 2003. Pet. App. 3.

Respondent timely appealed to the Fourth Circuit, challenging the district court's rejection of her federal claims. On January 7, 2005, the Fourth Circuit affirmed the decision of the federal district court as to each of respondent's federal claims. Pet. App. 3.

Respondent timely sought rehearing en banc, and on March 8, 2005, the Fourth Circuit denied that request. Pet. App. 4.

3. Three days later, on March 11, 2005, respondent filed suit in the Circuit Court for Montgomery County reasserting her state law claims. Although the complaint was filed more than three years after her claims had accrued, respondent contended that her suit was timely under 28 U.S.C. § 1367(d), which provides that the "period of limitations" for an asserted pendent state law claim "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."

The trial court nonetheless determined that respondent's suit was time-barred. Pet. App. 70-71.

Respondent timely appealed to the Maryland Court of Special Appeals, which affirmed, holding that Section 1367(d) did not suspend the running of the statute of limitations on respondent's state law claims, but merely provided an extra thirty days after the federal district court's dismissal of the claims. Because respondent's complaint in state court was filed nearly three years after the federal district court's initial dismissal of her state claims in March 2002, and nearly five years after her cause of action

accrued, the court concluded that respondent's suit was untimely. Pet. App. 42-43.

Respondent appealed to the Court of Appeals of Maryland, which reversed. That court held that respondent's state law claims were "pending" for purposes of Section 1367(d) until the Fourth Circuit's denial of rehearing on March 8, 2005. Since respondent had filed her state court complaint three days later, it was timely. Pet. App. 29-30. The court explained that when a federal district court dismisses state law claims because it has dismissed all related federal claims, "the appeal is likely to be focused on the dismissal of the Federal claims." Pet. App. 25. In these circumstances, the state law claims "remain very much in play" because if the district court is reversed, "the District Court's supplemental jurisdiction over those pendent claims will remain and likely will be exercised." Pet. App. 25. To hold otherwise, the court reasoned, would force plaintiffs wanting to appeal an adverse federal district court decision to "fil[e] a new action in State court and hop[e] that the State court will stay proceedings while the plaintiff pursues . . . the appeal," precisely the scenario Section 1367(d) was designed to avoid. Pet. App. 25.

The court also addressed Section 1367(d)'s tolling effect. The Maryland high court adopted the "suspension approach," under which "upon dismissal of the pendent claims, the plaintiff would have whatever time was left under the State statute of limitations when the action was filed in Federal court plus 30 days." Pet. App. 13 (emphasis omitted). It concluded that the suspension approach was most consistent with both the dictionary definition of

"tolling" and this Court's prior interpretations of the concept. Pet. App. 18. The court thus rejected petitioners' alternative "extension approach," under which "if the limitations period under State law expires during the pendency of the Federal action, it is simply extended until the 30th day after dismissal of the pendent claims." Pet. App. 13 (emphasis omitted). The court concluded that the extension approach was untenable "[a]s a matter of statutory construction." Pet. App. 16. Congress, the court reasoned, "used the word 'tolled' without qualification, presumably aware of how that word had previously been interpreted and applied by the Supreme Court . . . and we can find nothing in the legislative history of the statute to indicate that it intended any other meaning." Pet. App. 19.

REASONS FOR DENYING THE WRIT

This case involves the construction of two words that appear in 28 U.S.C. § 1367(d) – "pending" and "tolled." Because the outcome turns entirely on the meaning of "pending" – a legal question as to which there is neither a conflict among the lower courts nor any other reason warranting this Court's review – certiorari should be denied.

I. The Outcome Determinative Issue In This Case – When Respondent's Claim Ceased To Be "Pending" Under Section 1367(d) – Does Not Justify This Court's Attention.

A. The Outcome In This Case Turns Entirely On Construction Of The Word "Pending."

1. The timeliness of respondent's suit in this case turns entirely on the definition of "pending"; the meaning of the word "tolled" would have no effect, regardless of which interpretation this Court adopted.

Respondent's position in this case is clear. Her state law claims remained "pending" in federal court, for purposes of 28 U.S.C. § 1367(d), until March 8, 2005, when the Fourth Circuit denied her timely petition for rehearing en banc. Petitioners' position is equally clear: respondent's claims ceased to be pending on March 26, 2002, the date the district court first declined to exercise jurisdiction over her state law claims. Pet. 13.

Assuming that respondent's construction of "pending" is correct, the judgment below must be affirmed under any plausible construction of "tolled," including petitioners'. If respondent's claims were pending until the Fourth Circuit denied rehearing en banc on March 8, 2005, then even under petitioner's view, respondent had thirty days from that date to file her complaint in state court. Because respondent in fact filed her suit *three* days after the denial of rehearing en banc, her complaint was timely even under petitioners' reading of "tolled." *See* Pet. 8, 17-

18. Thus, if respondent's view of "pending" is correct, she would prevail under any construction of "tolled."

At the same time, if *petitioners'* view of "pending" were correct, there would be no occasion to decide what "tolled" means either, because so long as the Court accepts petitioners' definition of "pending," respondent would lose under any definition of "tolled." According to petitioners, respondent's state claims ceased to be pending in federal court on March 26, 2002, when the district court dismissed them. *See* Pet. 13. Respondent did not file those claims in state court until nearly three years later, on March 11, 2005. That three-year period would render respondent's state court filing untimely under any construction of "tolled," because the maximum remaining limitations period on respondent's claims was just under two years. Thus, if petitioners' construction of "pending" is correct, then respondent's state suit was untimely and this case does not present the opportunity to address the proper meaning of "tolled" in Section 1367(d).

In sum, under either party's construction of "pending," this case does not present a vehicle for resolving any disagreement over the tolling effect of Section 1367(d).

B. There Is No Disagreement Among Lower Courts On The Meaning Of "Pending" In Section 1367(d).

As petitioners' *amici* acknowledge, the issue of whether an action has been refiled in accordance with the time limits of 28 U.S.C. § 1367(d) arises only in *state* court. Br. of North Carolina et al. 4. Other

than the Maryland intermediate state court in this case, *see* Pet. App. 47-51, whose holding was reversed by the Maryland Court of Appeals, *see* Pet. App. 29-30, no state court has ever adopted petitioners' version of "pending." Rather, every court that has ruled on the issue has interpreted "pending" to include the entire federal appellate process. *See Okoro v. City of Oakland*, 48 Cal. Rptr. 3d 260, 264 (Cal. Ct. App. 2006) (citing *Kendrick v. City of Eureka*, 98 Cal. Rptr. 2d 153, 157 (Cal. Ct. App. 2000)); *Berke v. Buckley Broad. Corp.*, 821 A.2d 118, 124 (N.J. Super. Ct. App. Div. 2003); *Harter v. Vernon*, 532 S.E.2d 836, 839 (N.C. Ct. App. 2000); *Fennell v. Stephenson*, 528 S.E.2d 911, 914 (N.C. Ct. App. 2000); *Huang v. Ziko*, 511 S.E.2d 305, 308 (N.C. Ct. App. 1999); *Lucas v. Muro Pharm. Inc.*, No. 944052, 1994 WL 878820, at *2-*3 (Mass. Super. Dec. 2, 1994).

Faced with this consensus view of "pending," petitioners cite only a single recent case – and that from a *federal district court* and not a court of appeals. *See* Pet. 13 (citing *Jarmuth v. Frinzi*, No. 1:04CV63, 2006 WL 4730263 at *12 (N.D.W. Va. July 25, 2007), *aff'd sub nom. Jarmuth v. Waters*, No. 06-1908, 2007 WL 685175 (4th Cir. Mar. 7, 2007)). But that decision creates no conflict, for it refers to the issue only in passing dictum, and (as noted *supra*) the proper construction of Section 1367(d) arises in the lower courts only in the state, not the federal, system.[2]

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[2] On appeal in *Jarmuth*, the Fourth Circuit expressly declined to address the meaning of "pending," affirming the

C. A State Claim Remains "Pending" Under Section 1367(d) Until The Conclusion Of All Proceedings Before A United States Circuit Court Of Appeals.

The consensus position – that state law claims remain pending until the end of federal proceedings – is consistent with both the plain language and underlying purposes of Section 1367.

1. The plain meaning of the word "pending" demonstrates that a pendent state law claim remains pending until the federal courts have conclusively resolved all federal and state claims.

Legal dictionaries define the word "pending" as "remaining undecided" or "awaiting decision." BLACK'S LAW DICTIONARY 1169 (8th ed. 2004); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1669 (unabr. ed. 1993) (defining "pending" as "in continuance," "not yet decided," or "until the . . . completion of"). Each of these definitions supports respondent's position that a claim remains "pending" through the conclusion of federal proceedings, including a timely appeal. Petitioners cite not a single dictionary definition of "pending" that supports their truncated interpretation of the term.

This Court's decision in *Carey v. Saffold*, 536 U.S. 214 (2002), is in accord. There, this Court held that an application for state collateral review was "pending" in state court for purposes of 28 U.S.C. § 2244(d)(2) during the interval between a lower court's

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decision on other grounds. *See Jarmuth v. Waters*, 2007 WL 685175, at *1.

determination and filing of a further original state habeas petition in a higher court. The Court explained that under the "ordinary meaning" of the word, a case is "pending" until its "final resolution" or "until the completion of" the review process. 536 U.S. at 219-20. Here, the federal process was not completed until March 8, 2005, when the Fourth Circuit denied respondent's timely petition for rehearing en banc.

The plain meaning of the word "pending" stated in dictionary definitions and adopted by this Court in *Carey* is the only interpretation of the term that makes sense. When a district court dismisses all federal and pendent state claims, reinstatement of the state law claims depends entirely on whether the appeals court reverses the district court's dismissal of the federal claims. If a federal appellate court reverses the district court's dismissal of federal claims, then the appeals court will normally reinstate a plaintiff's pendent state law claims. *See* 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3567.3 (3d ed. 2009 Supp.) ("[W]hen an appellate court reinstates a claim that invokes federal subject matter jurisdiction, it may also reinstate related state claims over which supplemental jurisdiction had been declined."); *see also, e.g.*, *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 79 (2d Cir. 2003) (taking such action). Accordingly, a litigant whose federal and state claims have been dismissed does not abandon her state claims by appealing the dismissal of the federal claims; that is in fact, as the Court of Appeals of Maryland recognized, Pet. App. 25, a common and entirely sensible way of also contesting

the dismissal of the state claims. Here, if the Fourth Circuit had reversed the district court's dismissal of respondent's federal claims, she certainly would have pursued her state claims on remand as well. A plaintiff's pendent claims thus "remain[] undecided" and are therefore still "pending" until appellate proceedings are concluded.

Petitioners seek to insert into Section 1367(d) language that Congress specifically chose to omit. An initial, unintroduced draft of Section 1367(d) included the language, "shall be tolled while the claim is pending in the *district* court." *See* Letter from Prof. Arthur D. Wolf, Professor at Western New England College School of Law, to Hon. Robert W. Kastenmeier (June 8, 1990), *in Hearing on H.R. 5381 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 688 (1990) [hereinafter *H.R. 5381 Hearing*] (emphasis added). However, H.R. 5381 as introduced used the more general reference of "pending in *Federal* court." *See* H.R. 5381, 101st Cong. § 120(a) (1990) (as introduced in House, July 26, 1990) (emphasis added); *see also* Memo from Prof. Arthur D. Wolf to Charles G. Geyh, counsel, Subcomm. on Courts, Intellectual Property, and the Administration of Justice (July 12, 1990), *in H.R. 5381 Hearing*, at 704. Ultimately, the entire prepositional phrase "in Federal court" was deleted. *See* H.R. 5381, 101st Cong. § 114(a) (as reported by H. Comm. on the Judiciary, Sept. 21, 1990). Congress thus rejected tying tolling explicitly to dismissal by a district court. Accordingly, this Court should give the provision its more general meaning

and one that more completely implements the purposes of the law.[3]

2. Respondent's interpretation of "pending" reinforces the two purposes of Section 1367 – namely, to promote judicial economy and safeguard a plaintiff's ability to file in federal court.

First, Section 1367 was intended to enable federal courts "to deal economically – in single rather than multiple litigation – with related matters, usually those arising from the same transaction [or] occurence." H.R. REP. NO. 101-734, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6874; *see also Jinks v. Richland County*, 538 U.S. 456, 463-64 (2003) (stating that Section 1367 was intended to "eliminate[] a serious impediment to access to the federal courts on the part of plaintiffs pursuing federal- and state-law claims that 'derive from a common nucleus of operative fact'" (quoting *Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).

Petitioners' view of "pending," however, undermines this goal. Under petitioners' interpretation, a significant risk arises that a state statute of limitations will run while a plaintiff is actually still litigating her claims in federal court. To

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[3] The unofficial commentary to Section 1367(d) included in the United States Code Annotated on which petitioners rely to support their version of "pending," *see* Pet. 13, is not binding guidance; it is merely a suggestion that recognizes that the term "pending" has not been definitively construed. Furthermore, the commentary does not preclude including federal appellate proceedings in the time that a claim remains "pending" under the statute.

avoid that risk, a plaintiff seeking a federal forum would have to file two separate lawsuits – one in state court covering her state claims, and another in federal court covering both her federal *and* state claims, and seek to stay the former. However, filing two different suits based on the same nucleus of facts leads to exactly the type of wasteful and duplicative litigation that pendent and supplemental jurisdiction were designed to avoid, and expends limited judicial resources that statutes of limitation were designed in part to preserve.[4]

Second, Section 1367 was designed to encourage filing of cases raising both federal and state law claims in federal court. *See* WORKING PAPERS AND SUBCOMMITTEE REPORTS OF THE FEDERAL COURTS STUDY COMMITTEE 557 (1990) (noting that "federal jurisdiction serves important federal interests" and that "[s]upplemental jurisdiction furthers these interests by making it easier for federal claimants to litigate their claims in a federal court"); *see also* H.R. Rep. No. 101-734, at 27-28 (1990). Petitioners' view of "pending" undermines this intended purpose by deterring plaintiffs from seeking a federal forum. A

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[4] Even if a plaintiff does pursue this "wasteful" option of duplicative filings, there is no guarantee that her stay in state court will be granted. If the state court issues a judgment before the federal court, the rule against claim splitting may give that judgment preclusive effect in the federal action, effectively depriving the plaintiff of her statutory right to a federal forum. This is the exact problem Congress sought to prevent in creating a Federal Courts Study Committee in the first place. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47 (1990).

plaintiff who is worried that the statute of limitations may run while her state claim remains under consideration by a federal Court of Appeals may feel compelled to forego her appeal as of right, *see* FED. R. APP. PROC. 4(a)(1), and refile her claim in state court. Petitioners' view of "pending" discourages plaintiffs from exercising that right.

If the Fourth Circuit had reversed the dismissal of any of respondent's federal claims, Section 1367(a) would have resulted in the district court once again also having supplemental jurisdiction over her state law claims. It makes no sense to say that respondent should nevertheless have filed a protective complaint in state court.

II. The Tolling Effect Of Section 1367(d) Is Not Squarely Raised In This Case And, In Any Event, Is Not Certworthy.

Perhaps recognizing that the outcome determinative issue in this case does not warrant this Court's review, petitioners try instead to focus attention on a different issue – the tolling effect of Section 1367(d). Petitioners' *amici* adopt a similar strategy, basing their argument for certiorari exclusively on that question while relegating to a single footnote discussion of the issue that actually resolves this case. *See* Br. of North Carolina et al. 3 n.3. But this case simply does not present an appropriate vehicle to determine the meaning of Section 1367(d)'s tolling provision. Even if it did, petitioners considerably overstate the extent and importance of any conflict on the issue. And in any event, the Court of Appeals of Maryland's decision is correct.

A. This Case Presents An Exceptionally Poor Vehicle For Addressing The Tolling Effect Of Section 1367(d).

Petitioners suggest that Section 1367(d)'s tolling provision "often is of dispositive importance to litigants prosecuting or defending actions containing both state and federal claims." Pet. 7. This choice of words is telling. While construction of the tolling provision may "often" be dispositive in other cases that could later be presented to this Court, it is not true here. As discussed above, the timeliness of respondent's state court filing – and therefore, the outcome of this case – depends entirely on when her state law claims ceased to be "pending" for purposes of Section 1367(d). *See supra* at 7-8.

Thus, if this Court were to grant certiorari to construe the tolling provision, there is very little prospect that the Court would actually reach the tolling issue. If, as petitioners contend, Section 1367(d)'s tolling provision presents a recurring question as to which courts across the nation actually require more guidance, then surely a case cleanly presenting that issue will soon come before this Court. In fact, the issue is squarely raised and outcome determinative in a case currently awaiting review by the Minnesota Supreme Court. *See Goodman v. Best Buy, Inc.*, 755 N.W.2d 354 (Minn. Ct. App. 2008).

B. Any Conflict Among State Intermediate Courts On The Tolling Effect of Section 1367(d) Does Not Warrant Review By This Court.

Vehicle problems aside, petitioners exaggerate the extent and importance of the conflict on Section 1367(d)'s tolling effect. The nascent disagreement among intermediate state courts on this issue does not warrant this Court's intervention.

1. The "tolling" issue that petitioners raise rarely matters. In the nearly two decades since Congress enacted Section 1367, only two state courts of last resort have addressed the meaning of Section 1367(d)'s tolling provision. In fact, this case represents the *only* decision involving an actual holding. The Maryland Court of Appeals became the first state supreme court to expressly decide the issue, concluding in the decision below that Section 1367(d) suspends the running of the state statute of limitations period during the entire time the state law claim is pending in federal court and for thirty days thereafter. *See* Pet. App. 13. The Maryland court's decision to reach the tolling issue was, however, unnecessary, because the outcome of the case was determined by its holding that respondent's claim remained "pending" until the Fourth Circuit denied her petition for rehearing en banc.

The only other state high court decision to consider the issue is the Supreme Court of Alabama's recent decision in *Weinrib v. Duncan*, 962 So.2d 167 (Ala. 2007), which stated that Section 1367(d) merely grants a plaintiff an additional thirty days to refile if the limitations period expires in the course of federal

court proceedings. *See id.* at 169-70. Though petitioners cite the decision as a holding, Pet. 10, the court's treatment of the tolling issue in *Weinrib* is dictum. In that case, the plaintiff filed suit in state court two days before the expiration of the state statute of limitations. The case was removed to federal district court, which granted summary judgment in favor of the defendant on the federal claim and refused to exercise supplemental jurisdiction over the state claim. The plaintiff did not appeal; instead, one year later, she refiled in state court. As a result, her refiled suit was untimely under *any* interpretation of Section 1367(d)'s tolling effect.[5]

2. Instead of pointing to a developed conflict among state courts of last resort, petitioners rely on a smattering of state intermediate court decisions in a few states. Three intermediate state courts have adopted petitioners' interpretation of Section 1367(d)'s tolling effect. *See Berke v. Buckley Broad. Corp.*, 821 A.2d 118 (N.J. Super. Ct. App. Div. 2003); *Harter v. Vernon*, 532 S.E.2d 836 (N.C. Ct. App.

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[5] Petitioner also cites the District of Columbia Court of Appeals' decision in *Stevens v. ARCO Mgmt. of Wash. D.C., Inc.* *See* Pet. 10. Like the Supreme Court of Alabama, the District of Columbia Court of Appeals appears to have assumed, but did not decide, that Section 1367(d) simply provides a thirty-day extension of the statute of limitations. *See Stevens v. ARCO Mgmt. of Wash. D.C., Inc.*, 751 A.2d 995, 997 (D.C. 2000). Its discussion is pure dictum because the plaintiff filed suit within thirty days of the federal court dismissal, and the dispute centered on whether Section 1367(d) applied at all. *Id.* at 997-98.

2000); *Kolani v. Gluska*, 75 Cal. Rptr. 2d 257 (Cal. Ct. App. 1998).[6] By contrast, three different intermediate state courts have held that Section 1367(d) suspends the running of the state statute of limitations period. *See Goodman*, 755 N.W.2d 354; *Oleski v. Dep't of Pub. Welfare*, 822 A.2d 120 (Pa. Commw. Ct. 2003); *Bonifield v. County of Nevada*, 114 Cal. Rptr. 2d 207 (Cal. Ct. App. 2002).

It would be premature for this Court to step in to resolve the disagreement among these intermediate courts before the states' own high courts have addressed the issue. The fact that so few have had the opportunity to do so belies petitioners' contention that Section 1367(d)'s tolling provision creates recurring and difficult problems for state courts. And if petitioners are right that the question arises frequently, the already thin conflict in these five states may diminish or disappear altogether as more state supreme courts weigh in.

3. Petitioners' citations to federal cases, Pet. 12, add nothing to its argument. As petitioners' own *amici* point out, the issue of the timeliness of an action refiled in state court under Section 1367(d) arises only in state courts. *See* Br. of North Carolina et al. 4-5. The federal courts of appeals have no

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[6] Petitioner cites *Dahl v. Eckerd Family Youth Alternatives*, 843 S.2d 956 (Fla. Ct. App. 2003), as having decided this issue as well, but the court's interpretation of the tolling effect in that case is dictum. The plaintiff refiled her claim within thirty days of dismissal by the federal court and therefore the tolling issue was not before the court. *Id.* at 958.

cause to decide the meaning of Section 1367(d)'s tolling provision. Accordingly, to the extent any federal decision has opined on the statute's application, the statements are plainly dicta.[7]

C. The Maryland Court of Appeals Correctly Held That Section 1367(d) Suspends The Running Of The Limitations Period On State Claims.

1. The dictionary definition of "toll," its interpretation in this Court and by other courts, and its use and context in Section 1367(d) all support the Court of Appeals' decision in this case.

Legal dictionaries define "toll" as "[t]o suspend or interrupt the running of the statute of limitations," BALLENTINE'S LAW DICTIONARY 1282 (1969), or "to stop the running of; to abate" specifically in the context of "a time period, esp[ecially] a statutory one," BLACK'S LAW DICTIONARY 1525 (8th ed. 2004). *See also* RANDOM HOUSE WEBSTER'S DICTIONARY OF THE LAW 431 (2000) (defining "toll" as "to suspend the running of the statute of limitations . . . . One speaks of circumstances that 'toll the statute' or 'toll the limitations period.'"). This definition squarely supports respondent's position and the position taken in the Maryland Court of Appeals: Section 1367(d)

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[7] Because federal courts "will never have occasion to pass upon whether an action was timely re-filed in state court under 28 U.S.C. § 1367(d)," Br. of North Carolina et al. 5, petitioners' contention that litigants are "subject to apparently divergent state and federal court interpretations" of Section 1367(d)'s tolling provision is meritless. *See* Pet. 12.

suspends the running of the limitations period while the claim is pending in federal court and for thirty days after its dismissal.[8]

Courts likewise have consistently defined "tolling" to mean that "during the relevant period, the statute of limitations ceases to run." *Chardon v. Fumero Soto*, 462 U.S. 650, 652 n.1 (1983); *see also Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554-55, 559 (1974) (using "toll" and "suspend" interchangeably); *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004) ("[M]ost statutes use the word 'toll' when the purpose of the statute is to interrupt the statute of limitations."); *Hunter-Boykin v. George Washington Univ.*, 132 F.3d 77, 83 (D.C. Cir. 1998); *Detweiler v. Pena*, 38 F.3d 591, 593 (D.C. Cir. 1994).[9]

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[8] If Congress had simply wished to extend the limitations period by a specific amount of time after dismissal, as petitioners urge is the case with Section 1367(d), it would have done so directly, as it has in other statutes. *See, e.g.*, 10 U.S.C. § 843(e) (2000) ("[T]he period of limitation ... is extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress."); 47 U.S.C. § 415(d) (2000) (stating that a "period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier"); 49 U.S.C. § 11705(d) (2000) ("The limitation period ... is extended for 6 months from the time written notice is given to the claimant ...."). By contrast, in Section 1367(d), Congress chose to use "toll[]," not "extend," to explain the statute's effect on the period of limitations.

[9] The cases petitioners cite to support their position of tolling either ignore the plain language in favor of policy-based arguments or offer no analysis at all. *See Huang v. Ziko*, 511

Petitioners cite *Chardon* to support the claim that "tolling" is "particularly challenging to construe, given [its] inherent variety of meaning." Pet. 15. But that decision supports respondent's interpretation of tolling. *Chardon* interprets "toll" as to suspend, and does not recognize any other interpretation of that term. Instead, the footnote on which petitioners rely explains that statutes may have differing "tolling *effect[s].*" 462 U.S. at 652 n.1 (emphasis added). As the Court recognized, Congress (and state legislatures) can write statutes that extend rather than suspend the limitations period, resulting in a "tolling effect" that departs from "the common-law rule of suspension." *Id.* at 655.[10]

But Congress did not adopt such a tolling "effect" in Section 1367(d). It instead flatly provided that the limitations period "shall be tolled," 28 U.S.C. §

S.E.2d 305, 308 (N.C. Ct. App. 1999) (omitting plain-language analysis, and instead deciding the issue because holding for plaintiff would be "contrary to the policy" it identified "in favor of prompt prosecution of legal claims"); *Berke*, 821 A.2d at 123 (relying on what it described as an "evident purpose of the statute . . . only to preserve a plaintiff's right of access to the state court for a minimum thirty-day period"); *Kolani*, 75 Cal. Rptr. 2d at 261-62 (ignoring the language of the statute, and instead deciding based on policy rationales); *see also Weinrib*, 962 So.2d at 170 (noting in dicta, without discussion, that Section 1367(d) only affords plaintiffs thirty days to refile in state court); *Dahl*, 843 So.2d at 958 (stating, without discussion, that Section 1367(d) "operate[s] to toll the matter for thirty days").

[10] The examples of statutes that the Court pointed to of "a variety of different tolling effects" did not use "toll" to describe their effect. *See Chardon*, 462 U.S. at 660 n.13.

1367(d), with no indication that it intended any other tolling mechanism than the standard one recognized in *Chardon* and elsewhere.

Furthermore, petitioners' interpretation violates the canon to "construe statutes, where possible, so as to avoid rendering superfluous any parts thereof." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991). Section 1367(d) dictates that the "[t]he period of limitations . . . shall be tolled" over two periods: (a) "while the claim is pending," *and* (b) "for a period of 30 days after [the claim] is dismissed." Petitioners' interpretation of Section 1367(d), that it "limit[s] the refiling period to 30 days following . . . dismissal," Pet. 8, renders superfluous the first instance when tolling occurs: "while the claim is pending."

2. Not only does respondent's interpretation better fit the language and structure of Section 1367(d), it better fulfills that section's purposes as well. Congress enacted Section 1367 to ensure that plaintiffs with federal and state claims would file all claims "economically" in federal court "in single rather than multiple litigation." H.R. REP. NO. 101-734, at 28. By freezing the running of the state statute of limitations period regardless of time spent in federal court, Section 1367(d) ensures that plaintiffs are not disadvantaged by bringing their claims in federal court, maintaining the proper incentives for a plaintiff to bring all related claims in a single, federal forum.

The statute as respondent interprets it does not "create[] perverse incentives to prolong federal litigation." Pet. 18. A plaintiff with the burden of

proof and limited resources has every incentive to try a case early, while evidence and witnesses are still available. Plaintiffs would defer filing in state court only so they can fully pursue their federal rights first, as respondent did in this case. This is a goal that animated Congress's passage of Section 1367.

3. The suspension approach to tolling raises no federalism concerns. This Court has already rejected the argument that Section 1367(d) is not a "'proper' exercise of Congress's Article I powers because it violates principles of state sovereignty." *Jinks v. Richland County*, 538 U.S. 456, 464 (2003). Instead, this Court has found "that § 1367(d) is necessary and proper for carrying into execution Congress's power '[t]o constitute Tribunals inferior to the supreme Court,' U.S. Const., Art. I, § 8, cl. 9, and to assure that those tribunals may fairly and efficiently exercise '[t]he judicial Power of the United States,' Art. III, § 1." *Id.* at 462. In enacting Section 1367(d), Congress decided that protecting litigants' access to federal court for supplemental claims outweighs states' interests in having their statutes of limitations continue to run. Doing so was a proper exercise of Congress's powers. *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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